No. 94-486

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

TAHOE KEYS PROPERTY OWNERS' ASSOCIATION, a California non-profit mutual benefit corporation,

Petitioner,

v.

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD; CALIFORNIA STATE REGIONAL WATER QUALITY CONTROL BOARD – LAHONTAN REGION; CALIFORNIA STATE RESOURCES AGENCY; AND DOES 1 through 25, Inclusive,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal, State Of California

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a state appellate decision, which merely affirms a trial court's denial of a preliminary injunction, constitutes a "final judgment or decree" permitting review by this Court under 28 U.S.C. § 1257.

2. Whether this Court can or should review a state court's preliminary injunction denial which rests on the adequate and independent state law ground that petitioner's claims are likely barred by state procedural doctrines including estoppel and laches.

3. Whether the state court correctly found that a water pollution mitigation fee imposed as a condition of permitted development complied with the Takings Clause of the Fifth and Fourteenth Amendments where a) the fee proceeds may only be used to offset the polluting effects of the development, and b) the fee only partially compensates for the cost of offsetting that pollution.

PARTIES TO THE PROCEEDING BELOW

Respondents agree with petitioner's characterization of the parties below. However, petitioner named the State of California Resources Agency as a defendant in its trial court complaint, and as a respondent before this Court. Under California statute, the Secretary of the Resources Agency rather than the Resources Agency itself should have been named. (See footnote 1 of California Court of Appeal decision at Pet. App. 2.) Therefore, this brief refers to the Secretary, rather than to the Agency, as a respondent.

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On Petition For Writ Of Certiorari To The Court Of Appeal, State Of California

RESPONDENTS' BRIEF IN OPPOSITION

Respondents State of California Regional Water Quality Control Board – Lahontan Region (Lahontan) and Secretary of the Resources Agency (Secretary) respectfully request that this Court deny the petition of Tahoe Keys Property Owner's Association (TKPOA) for a writ of certiorari seeking review of the opinion of the Court of Appeal of the State of California, Third Appellate District.

JURISDICTION

This Court lacks jurisdiction because petitioner has not sought review of a final state court judgment or decree as required by 28 U.S.C. § 1257(a). Petitioner, rather, challenges an appellate state court decision affirming an interlocutory trial order: the denial of a preliminary injunction.

This Court also lacks jurisdiction herein because the state appellate decision rests on an adequate and independent state law ground.

STATEMENT OF THE CASE

Respondents incorporate by reference the facts as stated by the California Court of Appeal's decision below. Pet. App. 1-38. See ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 373 (7th ed., 1993) (approving this practice).

In addition, respondents wish to correct two misstatements in the petition. First, TKPOA fails to disclose the key fact, fully noted by the court below, that the mitigation fee challenged herein was not proposed by respondents; ***it was instead proposed by TKPOA itself.*** Pet. App. 32. Moreover, ***TKPOA*** asked that the fee only be applied prospectively. *Ibid.*

Second, TKPOA asserts throughout its petition that the fee which it now opposes was solely imposed to mitigate the effects of ***past*** development activities. The court below, however, correctly found that the assertion was not supported by the record. Pet. App. 30. To the contrary, the record indicates that the vast majority of

pollution being mitigated comes from the *continuing* operation and maintenance of the lands and facilities at issue, not from past development. *Id.*, at 30-31.

REASONS FOR DENYING THE WRIT

The writ should be denied because the California Court of Appeal's decision is not a "final judgment." It is, rather, an interlocutory state court decision and therefore not reviewable under 28 U.S.C. § 1257. In addition, the decision below is not reviewable because it rests on an adequate and independent state law ground: petitioner lacked a reasonable probability of success on the merits since its claims are in all likelihood barred by state procedural doctrines that preclude stale and inequitable claims. Finally, even if these two critical jurisdictional defects did not exist, review should be denied because the decision below is highly fact-bound and because it correctly analyzes and applies pertinent constitutional principles.

I.

THIS COURT LACKS JURISDICTION BECAUSE NO FINAL JUDGMENT HAS BEEN RENDERED; THE STATE COURT OF APPEAL ONLY AFFIRMED A PRELIMINARY INJUNCTION DENIAL

Title 28 U.S.C. § 1257 expressly limits this Court's review of state court decisions to "[f]inal judgments or decrees." In the instant case, however, no final judgment or decree has been rendered. The California Court of

Appeal's decision merely affirms a preliminary injunction denial. Trial of the matter has yet to occur.

Petitioner conspicuously fails to address this basic, threshold jurisdictional requirement. This is fatal. "Upon application to this Court for review of the judgment of a state court it is the petitioner's burden to show affirmatively that we have jurisdiction." *Gorman* v. *Washington Univ.*, 316 U.S. 98, 101 (1942). Petitioner, however, has not even attempted to demonstrate finality.

Finality is not only required by statute; it is also central to the effective functioning of the courts. This Court has thus explained that the requirement "is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." *Radio Station WOW* v. *Johnson, Inc.*, 326 U.S. 120, 124 (1945).

The requirement applies to most state preliminary injunction decisions under "the salutary and long-standing rule that decisions upon interlocutory injunctions are not final judgments." *Construction Laborers* v. *Curry*, 371 U.S. 542, 552 (1962). There is a limited exception to this venerable rule: "The assertion by the state court of ***power*** to act in an interlocutory way is final. Whether it has that ***power*** may be determined without reference to any future proceedings which may be taken." *Montgomery Bldg. & Constr. Trades Council* v. *Ledbetter Erection Co.*, 344 U.S. 178, 181 (1952) (Douglas, J., dissenting) (emphases in original); *Curry*, 371 U.S. at 552.

The present case, however, does not fall within this limited exception. All parties agree that the state trial court has the power to issue a preliminary injunction

upon the requisite showings of probability of success on the merits and threatened harm. The only relevant issue on appeal to the state appellate court was whether those showings were made on the facts presented to the trial court. The decision below thus involves a classic interim determination which is not reviewable by this Court on certiorari.

II.

THE STATE COURT'S PRELIMINARY INJUNCTION DENIAL RESTS ON AN ADEQUATE AND INDEPENDENT STATE GROUND: PETITIONER'S CLAIMS ARE LIKELY BARRED BY STATE PROCEDURAL DOCTRINES WHICH PROHIBIT STALE AND UNFAIR CLAIMS

Even if the California Court of Appeal ruling had been final, review by this Court would still be unwarranted because the decision is fully supported on an independent state ground: state procedural doctrines will doubtlessly preclude TKPOA's claims. Review would also be unwarranted since these doctrines are very fact-specific; it is therefore unlikely that a ruling by this Court would have a significant impact beyond the parties to this lawsuit.

Under California law, preliminary injunction determinations fall within a trial court's "sound discretion." *Cohen* v. *Bd. of Supervisors*, 40 Cal.3d 277, 286, 219 Cal.Rptr. 467, 707 P.2d 840 (1985). To obtain a preliminary injunction, a party must establish, *inter alia*, that it has a reasonable probability of success on the merits. *Id.*, at 286-287.

Applying this test to the facts before it, the California Court of Appeal properly concluded that TKPOA is unlikely to prevail on the merits. In reaching this conclusion, the court found that the state law-based procedural defects in this case are so serious that "there is substantial doubt that TKPOA will even be allowed to proceed to the merits of its [federal] claim." Pet. App. 32. This finding, without more, fully justified denial of the requested preliminary injunction under California law. *Cohen*, 40 Cal.3d, at 286; *Jessen* v. *Keystone Savings & Loan Ass'n*, 142 Cal.App.3d 454, 459, 191 Cal.Rptr. 104 (1983).

Petitioner does not even acknowledge this state law basis of the California Court of Appeal's ruling. This Court, however, not only should not, but *cannot* review a state court decision supported by an adequate and independent state law ground. *Coleman* v. *Thompson*, 501 U.S. 722, 729 (1991). This rule is jurisdictional. *Ibid.*

As will be seen, the California Court of Appeal was fully correct in finding that TKPOA's lawsuit suffers from fundamental procedural flaws. TKPOA's claims are doubtlessly barred by the state law principles of estoppel, unclean hands, waiver, statutes of limitations and laches.

A. TKPOA's Challenge Of The Very Fee Which TKPOA Itself Proposed Is Likely Barred By State Law Doctrines Which Prohibit Unfair Claims (Estoppel, Unclean Hands And Waiver)

A critical fact which underscores the unfairness of TKPOA's lawsuit cannot be found in its petition. As pointedly noted by the court below, the fee which TKPOA now challenges ***was proposed by TKPOA itself***. Pet. App.

32. In addition, it was ***TKPOA*** which asked that the fee only be applied prospectively. *Ibid.* Nine years after its request was accepted by the state agencies, however, TKPOA decided to attack the fee in the present litigation, and to attack the fact that the fee is only prospectively applied.

Well-settled state law doctrines of estoppel and unclean hands, however, bar TKPOA from making these belated, unfair challenges. See *Edmonds* v. *County of Los Angeles*, 40 Cal.2d 642, 650, 255 P.2d 772 (1953) (equitable estoppel bars challenge of permit condition accepted by applicant); *Garamendi* v. *Mission Ins. Co.*, 15 Cal.App.4th 1277, 1289, 19 Cal.Rptr. 2d 190 (1993) (unclean hands bars relief where one induces state agency to act by failing to disclose material fact).

Lawsuits based upon this type of unjust conduct are also barred under California's rule of waiver. That rule was described in *Rossco Holdings, Inc.* v. *State of California*, 212 Cal.App.3d 642, 260 Cal.Rptr. 736 (1989), *cert. denied*, 494 U.S. 1080 (1990), as follows:

> "A landowner cannot challenge a condition imposed upon the granting of a permit after acquiescence in the condition by either specifically agreeing to the condition or failing to challenge its validity and accepting the benefits afforded by the permit." *Id.*, at 654.

TKPOA's claims thus directly contravene settled state doctrines that bar unfair claims.

B. TKPOA's Nine Year Old Claims Are Further Barred Because They Are Stale

The resolutions which TKPOA challenges were both adopted in 1982. Pet. App. 6-7. TKPOA, however, waited until 1991 to challenge the validity of those resolutions. Pet. App. 7-8. TKPOA cannot cite any statute which would allow claims that are so stale.[1]

TKPOA's claims began to run when the challenged resolutions were adopted. *Barancik* v. *County of Marin*, 872 F.2d 834, 836 (CA9 1988), *cert. denied*, 493 U.S. 894 (1989) (claims that ordinances are invalid accrue when the ordinances are adopted); also see *Soderling* v. *City of Santa Monica*, 142 Cal.App.3d 501, 505, 191 Cal.Rptr. 140 (1983) (claims accrue when contested conditions are first imposed by a tentative map approval, not the future date on which the final map is reviewed). Any constitutional infirmities, and the economic impact on members' parcels, occurred in 1982, when the resolutions were adopted. TKPOA, however, waited nine years to file its lawsuit. The action is therefore untimely.

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[1] TKPOA's claims for alleged due process and equal protection violations are subject to a one year limitations period. See *Usher* v. *City of Los Angeles*, 828 F.2d 556, 558 (CA9 1987). Its particular inverse condemnation claims and allegations of regulatory infirmities come under the catch-all four year limitations period of California Code of Civil Procedure section 343. Even an assertion that TKPOA's inverse condemnation claim is subject to the five year period for physical invasions of property (see *Otay Water Dist.* v. *Beckwith*, 1 Cal.App.4th 1041, 1048, 3 Cal.Rptr. 2d 223 (1991)) would not help TKPOA, since its lawsuit would still have been filed four years too late.

TKPOA's claims are independently stale under California's doctrine of laches. Laches applies where there has been unreasonable delay in filing suit, plus prejudice to the defendant resulting from delay. See *Northridge Hosp. Found.* v. *Pic 'N' Save No. 9, Inc.*, 187 Cal.App.3d 1088, 1101, 232 Cal.Rptr. 329 (1986).

This is a classic laches case. TKPOA's extraordinary delay in filing suit was unreasonable. TKPOA was aware of all key facts back in 1982, and could have filed a virtually identical complaint at that time. Instead, for nine years TKPOA sat on whatever rights it had. Moreover, TKPOA's delay caused significant prejudice. Lahontan and the Secretary spent an untold number of hours (and taxpayers' dollars) on studies and workshops which analyzed mitigation fee projects. Pet. App. 9, fn. 7. Rather than seeking to block those activities, TKPOA was an active participant. *Ibid.* Then, after those tax dollars were spent, TKPOA inexplicably filed suit.

The California Court of Appeal's finding that TKPOA is unlikely to prevail on the merits is thus well supported by an adequate and independent state law ground. TKPOA's challenges are in all probability barred by established state procedural doctrines which preclude unfair and stale claims.

III.

THE CALIFORNIA COURT OF APPEAL DECISION IS FULLY CONSISTENT WITH *NOLLAN* AND *DOLAN*

TKPOA argues that the test used by the California Court of Appeal in reviewing the mitigation fee's constitutionality conflicts with the standard used in *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan* v. *City of Tigard*, 512 U.S. ___, 114 S.Ct. 2309 (1994). However, the appellate determination is fully consistent with those decisions.

Dolan held that two questions must be answered in reviewing whether permit conditions that require property dedications violate the Takings Clause of the Fifth Amendment of the United States Constitution. First, does an "essential nexus" exist between a "legitimate state interest" and the permit condition exacted by the [public entity]? *Dolan*, 114 S.Ct., at 2317. This was the question addressed in *Nollan*. *Ibid.* If that requisite connection exists, the court needs to answer a second question: is the condition "roughly proportional" to the development's impact? *Id.*, at 2319.

The California Court of Appeal applied this analysis. It expressly found that the *Nollan* "essential nexus" exists as follows:

> "Since the state's justification for the imposition of a mitigation fee upon Tahoe Keys property owners was to ameliorate the effects of pollution from the Tahoe Keys development, there can be no doubt that justification for the regulation at issue here does constitute an important state

> interest reasonably related to the development and build out of the Tahoe Keys." Pet. App. 25.

The court also properly applied the second part of the *Dolan* test, and found that the fee was based upon appropriate calculations:

> "The mitigation fee charged to TKPOA's members was calculated based upon estimates of the quantities of nutrients entering Lake Tahoe as a result of the development and continuing maintenance and operation of the Tahoe Keys subdivisions and lagoons. And the mitigation fund was specifically dedicated to partial mitigation of the effects of that source of pollution through projects to abate or at least offset the polluting effects of the Tahoe Keys." Pet. App. 25-26.

Thus, even if the California Court of Appeal decision had been a final judgment, and even if it had turned on federal grounds, certiorari would not be warranted because the decision is fully consistent with this Court's precedents in *Nollan* and *Dolan*.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: October 13, 1994

Respectfully submitted,

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